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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT of the UNITED STATES
OCTOBER TERM, 1989

LINDEN SHIPMAN,
Petitioner,

vs.

MISSOURI DIVISION OF CHILD SUPPORT ENFORCEMENT, JOSEPH J. O'HARA, MICHAEL R. HENRY, and WILLIAM R. RAPPS, Individually and as Director of the Division of Child Support Enforcement,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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November, 1989

QUESTIONS PRESENTED FOR REVIEW

1.) Whether a plaintiff is a prevailing party within the meaning of 42 U.S.C. §1988 when the defendant after four (4) years of vigorous and determined litigation voluntarily concedes the relief sought and admits he was motivated in his action by hope of resolving the lawsuit.

2.) Whether a case challenging the practices of state officials in setting and enforcing the "state debt" becomes moot when the statute creating the debt is amended but does not change the practice of the officials who continue to insist on the validity of those practices.

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JURISDICTION

The judgement of the United States Court of Appeals for the Eighth Circuit was entered on June 12, 1989. A timely petition for rehearing and suggestions for rehearing *en banc* were denied on August 18, 1989 and this petition for certiorari is being filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. §1988:

In any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as a part of the cost.

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MISSOURI DIVISION OF CHILD SUPPORT ENFORCEMENT, JOSEPH J. O'HARA, MICHAEL R. HENRY, and WILLIAM R. RAPPS, Individually and as Director of the Division of Child Support Enforcement,

Respondents.

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STATEMENT OF THE CASE

The State of Missouri participates in the joint state-federal Child Support Enforcement Program under Title IV-D of the Social Security Act. 42 U.S.C. §651-665. The statutory scheme requires the State to adopt a state plan for establishing and enforcing the payment of child support. It provides for recovery from a non-custodial parent of public assistance (*i.e.* Aid to Families with Dependent Children and Medicaid) paid by the state on behalf of the dependent children and the custodial parent.

In 1982 Missouri enacted §454.465 *et seq.* R.S.Mo.

empowering the Director of the Division of Family Services (DFS)[1] to set the amount of the debt owed to the state ("state debt") in cases where no court order covered that parent's support obligation. Unlike the federal program regulation at 45 C.F.R §§302.50 and 302.53 which require the use of a formula to determine the state debt, the state statute instructed the Director to set the debt at an amount equal to the total amount of public assistance paid. (See Appendix A49)

In September 1979 Petitioner Linden Shipman was divorced from Maudie Shipman. He had four children, two of which were children of that marriage. The divorce decree awarded the wife custody of their two minor children but was silent as to any support obligation. From March 1978 through March 1983 she received Aid to Families with Dependent children (AFDC) from DFS. She also received AFDC from June-September 1983 and April- May 1984.

On April 6, 1983, the Director initiated an administrative collection proceeding against Shipman by issuing a Notice of Finding of Financial Responsibility/State Debt. The Notice set the state debt at $11,722.00, the amount of public assistance paid to Maudie Shipman through March 1983 and named Shipman as the Respondent. At the time Shipman had remarried and was supporting a wife, two of his own children and three step-children as a laborer earning $3.65 per hour. The family had also qualified for food stamps. (*Defendant's Hearing Exhibit H*, unnumbered page 77 introduced at March 28-29, 1988 Hearing).

The Notice and supporting payment records were certified

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[1] The Division of Family Services was designated as the state agency responsible for administration of the Child Support Enforcement Program in Missouri. The Division of Child Support Enforcement was created in 1986 as the successor agency to DFS and assumed responsibility for administration of the program. Both agencies are referred to herein as the "Division."

by the Division to the Circuit Court of Dunklin County for hearing. There was no opportunity for a hearing prior to the findings by the Director although a form request for a hearing was served with the Notice. He was informed that he was responsible for repaying the state debt under §454.465 *et seq.* and unless he requested a hearing within twenty (20) days, an administrative default order would be entered subjecting any wages or property to withholding, garnishment, liens and execution. Shipman returned the request stating that he lacked the ability to pay the debt and had never been informed he owed any child support.

Shipman subsequently filed suit under 42 U.S.C. §1983 in United States District Court for the Eastern District of Missouri seeking injunctive relief, monetary damages, declaratory judgement and attorney fees under 42 U.S.C. §1988. In his complaint, Petitioner asserted the practices of the Director in setting and enforcing the state debt at the total amount of public assistance paid violated the Fourteenth Amendment and the Supremacy Clause of the Constitution of the United States and the federal program regulations at 45 C.F.R. §302.1 *et seq.* Plaintiff further asserted that the administrative hearing process was defective in that it was not within the scope of or subject to review under the Missouri Administrative Procedures Act and that the Missouri Supreme Court had declined to issue any rules for conducting the hearings referred to the circuit court although expressly authorized to do so under §454.510 R.S.Mo.

On June 18, 1984, approximately ten (10) months after suit was filed, the Missouri legislature amended §454.465 *et seq.* to authorize the Director to set the state debt in an amount "not to exceed the amount of public assistance paid." The circuit courts were no longer responsible for conducting administrative hearings for that function was transferred to an administrative hearing officer within the Division. The amendments specifically provided that the hearings would be conducted pursuant to the procedures

and practices provided in Chapter 536, R.S.Mo. (the Missouri Administrative Procedures Act). The amendment further provided the "division shall not be stayed from enforcing and collecting upon the administrative order during the hearing process and during any appeal to the courts of this state, unless specifically enjoined by court order." 454.475 R.S.Mo. 1984.

The federal district court dismissed the entire action, including the damage claim, eleven (11) days later on June 29, 1984 on abstention grounds and petitioner appealed to the Eighth Circuit Court of Appeals. Shipman thereafter moved to dismiss the administrative hearing before the state circuit court based on the 1984 amendments which transferred all authority for hearings to an administrative hearings officer. The Division opposed dismissal and the court remanded to the Division for further proceedings under the amended hearing provision, but stayed the remand in order to permit the Division to seek a writ of prohibition in the Missouri Court of Appeals. The Division filed a petition for writ of prohibition to prevent remand of the case and to require the circuit court to decide the state debt under the 1982 statutes.

In the parallel federal appeal, the Eighth Circuit vacated the order of dismissal entered by the district court and remanded with directions to retain jurisdiction until the Missouri Court of Appeals had ruled on the writ of prohibition. If the writ were denied and the case remanded to the Division for further proceeding, the district court was instructed to dismiss the entire case, including the claim for monetary damages, as moot. In their brief before the Eighth Circuit filed almost five months after the 1984 amendments, the Defendants themselves had maintained the 1984 amendments to §454.465 *et seq.* "did not moot appellant's claims, except for future relief" (Brief of Appellees in appeal No.

84-1961 EM, Argument III, p.41).[2]

The writ of prohibition was ultimately denied and the proceeding remanded to the Division for further proceedings. On July 30, 1987, plaintiff moved in the federal district court to amend his complaint asserting that despite the amendments, the Defendants were continuing their practice of setting the state debt at the amount of public assistance paid contrary to the mandate of the federal regulations.

Plaintiff moved for summary judgement on September 9th. On November 4th Defendants filed a cross motion for summary judgement. On November 5th the district granted leave to amend and scheduled a hearing for November 9, 1987 on pending motions. At that hearing, counsel for the state announced to the court that he intended to file a motion to dismiss for lack of standing and that Defendant Henry was expected to provide an affidavit in support of the motion. (TR. Hearing of November 9, 1987, p. 22-23, lines 16-25/1-8). On December 4th Defendant submitted an affidavit in which he stipulated that the administrative

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[2] Defendants further acknowledged:

> It is impossible to ascertain that all of Appellant's allegations have been mooted by the enactment of House Bill No. 1275 [including amendments to §454.465 *et seq.*] because the entire method for establishing and collecting the state debt has not been changed. (Brief p. 44).

Defendant Henry was as a party pursuant to Rule 25 F.R.Civ.P. as current Director of the Division. Prior to his appointment as Director he had been a staff attorney for the DFS. He testified during the Hearing on March 28-29, 1989 that after the 1984 amendments, the Division did not change its policy of setting or enforcing the state debt at the total amount of public assistance paid. (TR. Vol. B, pp. 39-40, lines 24-25/1-2). He further admitted the Division had not adopted the formula provided by 45 C.F.R. §302.53 for setting the state debt and had no plans to do so in the future (TR. Vol. B, p. 33, lines 3-18; p. 36, lines 16-20).

case had been closed and that the Division would take no further enforcement actions against Shipman for recovery of the state debt. At no time prior to November 1987 did the Division notify Shipman or his attorney that it had withdrawn the Notice of Financial Responsibility/State Debt or otherwise dismissed or closed the administrative proceeding (Memorandum Opinion dated May 20, 1987, *Finding of Fact* No. 46 and 48).

On January 25, 1988, the district court granted summary judgement dismissing the case as moot and for lack of standing. Shipman filed a timely notice of appeal. He also filed an application for an award of attorney fees as a "prevailing party" under 42 U.S.C. §1988 based on the relief conceded by Defendant Henry.

At the hearing on the motion, Defendant Henry testified that he had first considered waiving the state debt in early November 1987 after he was made aware of the possibility of doing so in conversations with his attorney. (TR., Vol. B, p. 31, lines 14-19). He stated he believed that his decision not to pursue the state debt against Shipman "would help resolve the dispute" and deprive Shipman of standing to proceed (TR., Vol. B, p. 22-23, lines 6-25/1-6).

The district court ruled Shipman was not a "prevailing party" within the meaning of §1988 and was ineligible for an award of attorney fees and costs. It held he had failed to prove a causal link between the lawsuit and Defendant Henry's decision not to pursue enforcement of the state debt. Shipman appealed.

The appeal from the denial of attorney fees (No. 88-1955) was consolidated with the appeal of the order of dismissal (No. 88-1315). Shipman moved the Eighth Circuit to vacate its mandate in Appeal No. 84-1961 in view of the evidence that the Division had continued its practice of setting the state debt at the total amount of public assistance as it had under the original enactment and that the case had not become moot until the stipulation in

1987 by Defendant Henry. The Court denied the motion.

On June 12, 1989 the Court of appeals affirmed the denial of attorney fees without analysis. It likewise affirmed the dismissal for lack of standing and mootness. It held Shipman had alleged no "real or threatened injuries" under the 1984 amendments and that any claims for monetary damages or declaratory relief became moot once the Missouri Court of Appeals had ruled and the district court was bound by the law of the case to follow its direction on remand following the previous appeal.

Shipman filed a request for rehearing with suggestions for rehearing *en banc*. Both were denied on August 18, 1989. Whereupon this petition for *Certiorari* was filed within ninety (90) days as provided by Rule 20.2. Jurisdiction is invoked under 28 U.S.C. 1254(1).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECSIONS OF OTHER COURTS OF APPEALS RESPECTING THE PROPER INTERPRETATION OF 42 U.S.C. §1988.

The decision of the Eighth Circuit Court of Appeals raises a significant and recurring problem for application of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C, §1988 where a lawsuit is mooted or settled by corrective action on the part of the defendant. Chief Justice Renquist and Justice O'Conner have referred to the divergence of views among the Courts of Appeal on the "important issue of how to determine when a party 'prevails' within the meaning of the Act." *Bonnes vs. Long*, 455 U.S. 961, 71 L.Ed.2d 681, 102 S.Ct. 1476 (1982) dissenting from denial of writ of certiorari.

Where a case is litigated to a conclusion and judgement entered for the plaintiff's success as a "prevailing party" for purposes of §1988 may be self-evident. Yet, when a case is

mooted or settled by the defendant's voluntary compliance with the relief sought in the lawsuit, his status as a prevailing party turns on the effects of his legal efforts as a catalyst prompting the defendant to reform his conduct.

In *Hewitt vs. Helms*, 482 U.S. 755, 96 L.Ed.2d 654, 107 S.ct. 2672(1987) this court stated:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under §1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgement--*e.g.*, a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgement in his favor. . . . [I]f the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed. [at 482 U.S. 760-761].

The ruling in *Hewitt vs. Helms* clarified in part the necessary condition for qualifying as a prevailing party under the catalyst theory. A plaintiff it was said must initially show he has received some benefit generally sought from his lawsuit and that they were prompted by the suit. The Court found it unnecessary to discuss the circumstances under which a plaintiff's suit may be said to have been a catalyst prompting defendant's voluntary compliance.

While there is general agreement among the circuits that some causal connection exist between a plaintiff's lawsuit and the relief or benefit obtained, the standards and degree of causation differ between circuits and not infrequently within the same circuit. *cf. Bonnes vs. Long*, 599 F.2d 1316, 1319 (4th Cir. 1979) *cert denied* and *Nadeau vs. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); also

see *Hennigan vs. Ouchita Parish School Board* 749 F.2d 1148 (5th Cir. 1985) and cases cited therein; *United Handicapped Federation vs. Andre*, 622 F.2d 342, 346 (8th Cir. 1980); *Oldham vs. Ehrlich*, 617 F.2d 163, 168 (8th Cir. 1980); *Charles vs. Coleman*, 689 F.2d 774, 776 (8th Cir. 1982); *Woe vs. Nebraska State Department of Public Welfare*, 608 F.2d 302-303 (8th Cir. 1979) (affirming an award of attorney fees where settlement was the result of a ruling in a state court action after the federal court had ordered abstention). Under the various formulations, a plaintiff may be required to show that the litigation was a "material," or "major" or "substantial" or "necessary and important" factor causing the change in the defendant's conduct. Other courts have asked whether the suit "prompted" the defendants to act or served as a "catalyst" or made a "significant contribution" to the measures taken by the defendants, or whether the action played a "significant role" in moving the defendants to act. The degree of proof required to establish the causal connection likewise varies from a relative low level as in *Bonnes, supra*, and the decisions interpreting its language which require minimal "contribution" to the more rigorous requirements of *Casines vs. Murchek*, 766 F.2d 1494, 1504 (11th Cir. 1985) and *Gerena-Valentine vs. Koch*, 739 F.2d 755, 759 (2d Cir. 1984), *cf. N.A.A.C.P. vs. Wilmington Medical Center, Inc.*, 689 F.2d 1161, 1169 (3rd Cir. 1982) court denied 460 U.S. 1052 (1983), (remedial nature requires application of the most expansive definition of causation). Several circuits are in accord in qualifying their causation standards by requiring only that the lawsuit serve "in part" as a catalyst which prompted the defendant to act and that "it is not necessary for the plaintiff's lawsuit to be the *sole cause or even primary cause* of defendant's decision to settle. [Emphasis supplied]. *United Handicapped Federation vs. Andre, supra* at 346-347; *N.A.A.C.P. vs. Wilmington, supra* at 1169; *Morrison vs. Ayboob,* 627 F.2d 669, 671 (3rd Cir. 1980) cert. denied 449 U.S. 1102 (1982); *Luethje vs. Peavine School District of*

Adair County, 872 F.2d 352, 354 (10th Cir. 1989); *Posada vs. Lamb County*, 716 F.2d 1066, 1072 (5th Cir. 1983). Similarly some courts have shifted the burden in the issue of causation where a plaintiff's lawsuit is mooted by defendant's corrective action and required the defendants to prove the absence of causation. *Koppel vs. Wien*, 743 F.2d 129, 135 (2nd Cir. 1984); also see *Hennigan vs. Ouachita Parish School Board*, 749 F.2d 1148, 1153-1154 (5th Cir. 1985).

In cases where a defendant successfully moots a lawsuit by conceding the relief sought by the plaintiff, the court must determine whether the lawsuit was a factor motivating the defendant to act. In those exceptional cases, as here, where a defendant admits he acted, at least in part, in hope of ending the lawsuit, a causal link will be clearly established. However, defendants, on the whole, are usually rather reluctant to concede that the litigation prompted them to mend their ways. Absent an admission by the defendant, the trial court is left with an intensely factual determination and application of the law. Too frequently these disputes result in protracted litigation which may be more expensive for the parties and time consuming for the courts than trial of the mooted or settled action.

The Eighth Circuit Court of Appeals in *United Handicapped Federation vs. Andre, supra*, at 346 adopted the two part test employed in *Nadeau vs. Helgemoe, supra*, at 281 for determining a prevailing status in mooted cases. The courts in *Nadeau* and *Andre* held that no attorney fees should be awarded if the court determines the suit was "completely superfluous" in achieving the improvements undertaken by the defendants on the plaintiff's behalf. Neither should fees be granted where the defendant's conduct was not required by law. The first test requires the court find a causal link, *i.e.* that the suit contributed to the decision to confer relief. Under the first formulation a plaintiff prevails if his suit and his attorney's efforts were "a

necessary and important factor in achieving improvements." *Nadeau,* at 281. The second is entirely legal and is satisfied by showing the suit was substantial enough that it would not have been considered "frivolous, unreasonable or groundless" had the plaintiff been permitted to press his claim.

The standard adopted by the Fourth Circuit Court of Appeals in *Bonnes vs. Long, supra* utilizes only a minimal causation analysis which turns on ". . . whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way".

There is a growing consensus among the Circuit Courts of Appeal that a plaintiff's suit need not be the sole cause or even primary cause of a defendant's decision to undertake corrective measures or settle a case. *United Handicapped Federation vs. Andre, supra* at page 1072; *Posada vs. Lamb County Texas, supra* at 354; *Morrison vs. Ayoob, supra* at 671; *DeMier vs. Gondles*, 676 F.2d 92 (4th Cir. 1982). In *N.A.A.C.P. vs. Wilmington Medical Center, supra*, at 1169, the court held that a plaintiff's suit need not have been the sole factor so long as it was a material one which along with other factors motivated the action taken by the defendants. It further stated: ". . . in determining whether causation is shown, a district court is bound to apply the most expansive definition."

In the present case plaintiff filed his suit in federal court specifically challenging the practices of the Division in pursuing collection efforts against him for recovery of the state debt. Defendant's concession of the state debt after four (4) years of vigorously opposing any relief was conferred an important benefit. The district court agreed. (Appendix, A25)

Plaintiff further established a causal link between his suit and the concession by the defendants. Defendant Henry as Director of the Division admitted that his decision was made immediately before the court hearing scheduled for November 9,

1987 on pending motions to include plaintiff's motions amend the complaint and for summary judgement. He first learned of the possibility of conceding the state debt in conversations with his attorney prior to the hearing. He understood from those discussions that by waiving the state's claim he might succeed in having the case dismissed for lack of standing. He likewise testified that he decided not to pursue the state debt further in hopes of resolving the dispute, although he asserted that was not the "overriding reason." (Appendix, A49).

In approving plaintiff's application for attorney's fees, Defendant asserted that he had other reasons for conceding the state debt. He stated that Shipman did not appear to possess sufficient assets to pay the debt. However, that assertion was at best pretextual since the Division was aware of Shipman's impecunious situation as early as June 1, 1983 for the Division appeared through counsel in the state circuit court for an administrative hearing. (See Defendant's Hearing Exhibit H, unnumbered page 77 from records in the circuit court proceeding showing income and family composition). Nevertheless, the Division vigorously pursued Shipman to collect $11,722.00 in state debt for the next four (4) years in the circuit court. As a further reason he stated it had been his belief that the state was foreclosed by the Missouri statute of limitations from seeking recovery of more than $600 of its claims. The simple fact is that the state circuit court *remand* of the administrative case to the Division for further proceedings preserved the Division's right to enforcement of its claims in the ongoing administrative process.

Defendant Henry testified that the Division had closed the case on May 31, 1984 and no *significant* action had been taken against plaintiff since that time. When examined, he admitted no final determination by the Director, either directly or through delegation of authority had been made, to close the case until his decision in November 1987. Moreover, his testimony was

erroneous in view of the fact that the administrative case was pending before the Circuit Court of Dunklin County from May 3, 1983 until July 11, 1986 when it was remanded to the Division. The Division was well aware of those proceedings inasmuch as it was represented by counsel in the proceeding before the court and authorized the filing of a petition for writ of prohibition opposing remand. (See Defendant's Exhibit H introduced during the Hearing on March 28-29, 1988). Plaintiff submits that the attempts to enforce the state debt in state court throughout that period was indeed a significant enforcement action as was the continuation of the administrative case on remand. Defendant Henry's testimony is incredulous since during 1985 plaintiff's appeal of the federal court's abstention ruling was pending before the Eighth Circuit, and at no time did Defendants advise the court or plaintiff that the state debt proceedings had been resolved. One would not think Defendants would have concealed so vital a fact from both the federal and state courts had such a decision been made.

The district court found no record that the Division notified plaintiff the case had been closed and that neither plaintiff nor his counsel were notified of any case closing. (Appendix, A23). That conclusion is not surprising since the administrative case was still pending in the state circuit court.

Defendant Henry claimed he was motivated to concede the state debt because plaintiff's case was the only administrative proceeding remanded to the Division by a state court and he was unsure how to proceed on plaintiff's request for a hearing. Defendant Henry testified that the case remained inactive following remand except for periodic updates of plaintiff's addresses. In such cases a relatively low standard of causation is appropriate where the evidence shows that the defendant's conduct was motivated at least in part by a desire to resolve the litigation. This is especially so where the evidence relevant to the

defendant's behavior is under his control and not easily available to the plaintiff. A stricter standard of causation as applied by the Eighth Circuit not only frustrates the congressional purpose but would allow the defendant to hide his true motivation behind what seems a plausible alternate justification.

At the bottom, Defendant Henry's alternative justification is the result of plaintiff's litigation effort in state court following the abstention ruling in the district court. A similar situation arose in *Woe vs. Nebraska State Department of Public Welfare, supra.* The district court abstained forcing the plaintiff to litigate an action in state to a successful conclusion. Thereafter the parties stipulated that the federal case could be dismissed. The Eighth Circuit held that plaintiff was a prevailing party despite the fact that the "primary source" of the agreement to settle was the ruling in the parallel state court action. In such cases plaintiff may be hesitant to defend an administrative proceeding which might jeopardize an award of attorney fees to which he would otherwise be entitled.

2. THE EIGHTH CIRCUIT'S DECISION IS IN CONFLICT WITH THIS COURT'S DECISION ON MOOTNESS

The Eighth Circuit in an initial appeal in this case from the district court's abstention ruling held the amendments to §454.465 *et seq.* R.S.Mo. mooted plaintiff's substantive claims, including those for monetary damages, injunctive relief, and declaratory judgement. It remanded the case to the district court and directed it to dismiss the action as moot if defendants petition for writ of prohibition were denied. If it were sustained the district court "was requested to review Shipman's claim as to whether the administrative review in state court under the old statute was insufficient to justify abstention. (Appendix, A46).

Defendants themselves argued the case did not moot appellant's [plaintiff's] claims except for future relief." (Brief of Appellees in appeal No. 84-1961 EM, p. 41). They further advised the court that it was impossible to determine that all of plaintiff's claims had been mooted "because the entire method for establishing and collecting the state debt has not been changed." (Brief of Appellees, p. 44).

On remand the Director testified that the Division did not change its practice of setting and enforcing the state debt at the total amount of public assistance paid and plaintiff would have been held accountable for the same amount of reimbursement. (Appendix, A49). He likewise admitted the Division had not adopted the formula required by 45 D.F.R. §302.53 for setting the state debt and had no plans to do so in the future. (TR. Vol. B, p. 33, lines 3-18; p. 36, lines 16-20).

The district court ruled that it was foreclosed by the law of the case from considering any injuries sustained by the plaintiff prior to the ruling of the Eighth Circuit. Plaintiff thereupon filed a motion to recall the mandate in the prior appeal based on the above evidence respecting the defendants' practices. The motion was denied on February 1, 1989. The issue was raised on appeal and on petition for rehearing.

It is clear from the facts stated above and to the Court of Appeals that neither plaintiff's claims for injunctive relief or monetary damages were mooted by the 1984 amendments which did not require the Division to change its practices in setting the state debt and which indeed were not changed. The claim for injunctive relief became moot on in November 1987 upon the concession of the $11,722 debt.

This court has addressed the requirements for mootness on several occasions. In *City of Mesquite vs. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 71 L.Ed.2d 152, 159, 102 S.Ct. 1070 (1982), the Supreme Court held:

> The test for mootness in cases such as this is a stringent one. Mere voluntary cessation of allegedly illegal conduct does not moot a case; if it did, the courts would be compelled to leave [t]he defendant . . . free to return to his old ways. [Citations omitted] A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur . . ..

Similarly, in *Detroit, Toledo Co. vs. Consolidated R. Corp.*, 767 F.2d 274 (6th Cir. 1985), the court stated:

> When a defendant voluntarily ceases allegedly illegal activity, but continues to insist on the validity of its position, cessation does not render an existing court action moot. (at p. 279).

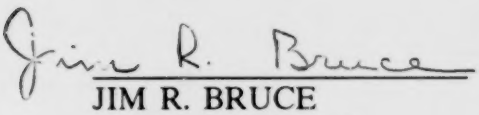
Also see: *Deakins vs. Monaghan*, ___U.S.___, 98 L.Ed.2d 529, 539, ___S.Ct.___ (1988) n. 4.

Defendants representation to the court as well as its failure to disclose or concede its claim for the state debt while continuing its enforcement efforts plainly establish the case was not moot.

CONCLUSION

For these reasons, Petitioner Linden Shipman respectfully requests that this petition for writ of certiorari be granted and the decision of the Eighth Circuit Court of Appeals be reversed.

Respectfully submitted,



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Attorney for Petitioner

November, 1989

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 88-1315 and 88-1955EM

Linden W. Shipman, Individually and on behalf of others similarly situated,

Appellant,

vs.

Missouri Department of Family Services and Joseph O'Hara, Individually and as Director of Division of Family Services,

Appellees.

Order Denying Petition for Rehearing

August 18, 1989

Appellant's suggestions for rehearing by the panel have been considered by the court and are denied.

Order entered at the direction of the Court
Robert D. St.Vrain, Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 88-1315 and 88-1955EM

Linden W. Shipman, Individually and on behalf of others similarly situated,

Appellant,

vs.

Missouri Department of Family Services and Joseph O'Hara, Individually and as Director of Division of Family Services,

Appellees.

Order Denying Petition for Rehearing
And Suggestions for Rehearing *En Banc*

August 18, 1989

Appellant's suggestions for rehearing *en banc* have been considered by the court and are denied by reason of the lack of a majority of the active judges voting to rehear the cases *en banc*.

Order entered at the direction of the Court
Robert D. St.Vrain, Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1315

Linden W. Shipman, Individually and on behalf of others similarly situated,

Appellant,

vs.

Missouri Department of Family Services and Joseph O'Hara, Individually and as Director of Division of Family Services,

Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

February 1, 1989

Appellant's motion to recall the mandate in a prior appeal, No. 84-1961, *Linden W. Shipman, etc. vs. Missouri Department of Family Services, et al.,* has been considered by the Court and is denied.

Order entered at the direction of the Court
Robert D. St.Vrain, Clerk, U.S. Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1315/1955

Linden W. Shipman, Individually and on behalf of others similarly situated,

Appellant,

vs.

Missouri Department of Family Services and Joseph O'Hara, Individually and as Director of Division of Family Services,

Appellees.

Appeals from the United States District Court for the Eastern District of Missouri.

Submitted: November 14, 1988
Filed: June 12, 1989

Before McMILLIAN and BOWMAN, Circuit Judges, and BOGUE, *Senior District Judge.

McMILLIAN, Circuit Judge

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*The Honorable Andrew W. Bogue, Senior United States District Judge for the district of South Dakota, sitting by designation.

Linden W. Shipman appeals from final judgements entered in the District Court[1] for the Eastern District of Missouri. In appeal No. 88-1315 the district court held that Shipman's 42 U.S.C. §1983 action challenging certain Missouri State Statutes is mooted by the subsequent amendment of the statutes and that Shipman lacks standing to challenge the 1984 enactments because no action under these enactments has been brought against him. In appeal No. 88-1955 the district court held that Shipman is not entitled to attorney fees because he failed to prove a causal connection between his suit and the 1984 enactments. For the reasons discussed below, we affirm the judgements of the district court.

In September 1979 Shipman was divorced from Maudie Shipman. The divorce decree awarded custody of Shipman's two minor children to Maudie Shipman, but the court made no provision for financial support. From March 1978 through March 1983 Maudie Shipman received aid for depending children (AFDC) from the Missouri Department of Family Services (DFS).

The State of Missouri participates in a joint state-federal Child Support Enforcement Program under Title IV-D of the Social Security Act. 42 U.S.C. §651-665 (1988). The statutory scheme provides for the recoupment from the noncustodial parent of state and federal funds paid to the custodial parent. The obligation of the noncustodial parent to reimburse the state for public assistance provided to his or her children was first mandated by Mo. Rev. Stat. §454.465 (1982) (1982 enactments).

The 1982 enactments empowered the Director of the DFS to set the amount of debt owed by the noncustodial parent ("state debt") in cases where no court order had established that parent's support obligation. Unlike the federal regulations at 45 C.F.R.

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[1]The Honorable David D. Noce, United States Magistrate for the Eastern District of Missouri, tried the case pursuant to 28 U.S.C. Section 636(c).

§302.1 *et seq.* which require the use of a formula to determine the state debt, the 1982 enactments merely instruct the Director to set the state debt at an amount equal to the public assistance paid.

On April 6, 1982, the Director issued a Notice of Finding of Financial Responsibility/State Debt to Shipman setting the state debt at $11,722, the amount of public assistance paid to Maudie Shipman through March 1983. In 1983, after a hearing, the DFS found Shipman to be financially responsible for $11,722 pursuant to the 1982 enactments. Shipman subsequently filed this civil rights action against DFS and its Director in federal district court. He asserted that appellees had violated the Equal Protection and due process clauses of the fourteenth amendment, the supremacy clause of the Constitution of the United States, the federal regulations contained at 45 C.F.R. §302.53, and article III section 1 of the Constitution of the State of Missouri. He sought injunctive and declaratory relief, monetary damages, and attorney fees. Shipman also filed an action in the Circuit Court of Dunklin County, Missouri.

In 1984 the Missouri General Assembly amended the 1982 enactments. Mo. Rev. Stat. §454.465(1)(1984)(1984 enactments). Under the 1984 enactments the Director was authorized to set the sate debt in an amount "not to exceed" the amount of public assistance paid.

The district court dismissed the instant case on June 29, 1984, on the grounds that abstention was appropriate. *Shipman vs. Missouri Division of Family Services*, 588 F. Supp. 1203, 1207 (E.D. Mo. 1984), *vacated mem.*, 782 F.2d 1048 (8th Cir. 1985). Shipman appealed the dismissal.

On May 24, 1985, the state circuit court also dismissed Shipman's case and remanded it to the DFS to be processed under the 1984 enactments. DFS then sought a writ of prohibition in the Missouri Court of Appeals.

In 1985 this Court heard Shipman's appeal from the district court's abstention dismissal. On November 8, 1985, this Court vacated the judgement of the district court and remanded the case with directions to retain jurisdiction until the Missouri Court of Appeals had ruled on the writ of prohibition. *Shipman s. Missouri Department of Family Services*, slip op. at 3-4 (8th Cir. November 8, 1985). If the wit were denied, the district court was ordered to dismiss this case as moot. *id.* The writ of prohibition was ultimately denied by the Missouri Court of Appeals, and Shipman was allowed to amend his federal complaint. On March 25, 1987, appellees moved for summary judgement stating that the Director would take no further action against Shipman under the 1982 enactments and arguing that Shipman lacked standing to pursue his challenge of the 1984 enactments.

On January 25, 1988, the district court granted appellees' motion for summary judgement on all issues except the award of attorney's fees. On May 20, 1988, the district court held that Shipman was not entitled to attorney's fees because he had failed to demonstrate a causal connection between his lawsuit and the state's amendment of the 1982 enactments. These consolidated appeals followed.

MOOTNESS (No. 88-1315)

Shipman argues that the district court erred in granting summary judgement to appellees on the basis that his claim is moot. He argues that his claims for declaratory relief and monetary damages should have been considered. We disagree.

In dismissing the case as moot, the district court was following this Court's mandate of November 8, 1985:

> Under the present ruling of the state court, Shipman's challenge to the old statute and administrative procedure is mooted. We therefore remand this case to the district court with directions

> to retain jurisdiction until such time as the Missouri Court of Appeals passes on the writ of prohibition. If the writ is denied and Shipman's case is remanded to the Division of Family Services to be processed under the amended statute, the federal district court should dismiss the case as moot. If, however, the writ of prohibition is sustained and Shipman is required to process his administrative review in the Missouri State Court under the old statute, the district court is requested to review Shipman's claim as to whether the administrative review in the state court under the old statute is insufficient to justify abstention under *Middlesex*. Under such circumstances, the district court is to either enter a new judgement on the grounds of abstention or to try plaintiff's claim under §1983.

Shipman vs. Missouri Department of Family Services, slip op. at 3-4 (8th Cir. November 8, 1985). Once the writ of prohibition was denied, the district court had no choice but to follow the mandate and dismiss all claims previously raised.

> When a case has been decided by this court on appeal and remanded to the District Court, every question which was before this court and disposed of by its decree is finally settled and determined. The District Court is bound by the decree and must carry it into execution according to the mandate. It cannot alter it, examine it except for purposes of execution, or give any further relief or review it for apparent error with respect to any question decided on appeal.

Houghton vs. McDonnell Douglas Corp., 627 F.2d 858, 864-865 (8th Cir. 1980) *citing Thornton vs. Carter*, 109 F.2d 316, 319-320 (8th Cir. 1940).

The district court properly followed the mandate of this Court by dismissing as moot all of Shipman's claims involving the 1982 enactments.

STANDING

Shipman argues that the district court erred in granting summary judgement to appellees on his claims based upon the 1984 enactments and the DFS's alleged practices subsequent to these enactments. He argues that he may be subject to a future action by appellees to recover state debt for AFDC payments made to Maudie Shipman after 1984. The district court properly held that Shipman lacked standing to challenge the 1984 enactments.

In order to establish standing, a plaintiff must show that he or she has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant and that the injury is likely to be redressed by a favorable decision. *Heckler vs. Mathews*, 465 U.S. 728, 738 (1984). The injury may not be merely "'conjectural' or 'hypothetical,'" *City of Los Angeles vs. Lyons*. 461 I/S/ 95. 102 (1983) (citations omitted), and the injury alleged must be fairly traceable to the challenged action. *Allen vs. Wright*, 468 U.S. 737, 751 (1984).

In the present action, Shipman alleges no real or threatened injuries as a result of the 1984 enactments. Appellees have not initiated any proceedings against Shipman under the 1984 enactments. Such proceedings are now merely conjectural. Therefore, the district court properly concluded that Shipman lacks standing to challenge the 1984 enactments.

CLASS CERTIFICATION

Shipman argues that the district court erred in dismissing his case without ruling on his motion for class certification. Shipman relies on *United States Parole Commission vs. Geraghty*, 445 U.S.

388, 401-02 (1980), (citations omitted) (*Geraghty*).

> Nor does a confession of judgement by defendants on less than all the issues moot an entire case; other issues in the case may be appealable. We can assume that a district court's final judgement fully satisfying named plaintiffs' private substantial claims would preclude their appeal on that aspect of the final judgement; however, it does not follow that this circumstance would terminate the named plaintiffs' right to take an appeal on the issue of class certification.

The district court in *Geraghty* had denied the plaintiffs' class certification motion. Therefore, the Supreme Court held the district court's ruling on the issue of class certification was appealable as a separate issue even though the named plaintiff's substantive claims had been mooted by his release from prison. In the instant case, Shipman did not file a motion requesting the district court to rule on the question of class certification, and the district court did not make a ruling. Under these circumstances *Geraghty* does not apply and the proper rule is that:

> Where named plaintiff's personal claim becomes moot prior to district court's ruling on certification of a class action, the court loses jurisdiction over the action because the case or controversy requirement of Article III is violated.

Inmates of Lincoln Intake & Detention Facility vs. Boosalis, 705 F.2d 1021, 1023 (8th Cir. 1983), *citing Vun Cannon vs. Breed*, 565 F.2d 1096, 1099 (9th Cir. 1977).

Nor does the narrow "relation back" exception of *Gerstein vs. Pugh*, 420 U.. 103 (1975) (*Gerstein*) apply to this case. *Gerstein* held that where a claim is "capable of repetition but evading review" a court may rule on class certification even if the named

plaintiff's individual claim became moot before the court had considered class certification. *Id.* at 110-111 n. 11. The present case does not meet the requirements of the *Gerstein* exception, because we hold the district court did not err in granting summary judgement to appellees without ruling on the issue of class certification.

ATTORNEY FEES (No. 88-1955)

Pursuant to 42 U.S.C §1988, Shipman argues that he is entitled to an award of attorney fees as a prevailing party under the "catalyst theory" of recovery. He argues that he is a "prevailing party" as required by *Hewitt vs. Helms*, 482 U.S. 755 (1987), because some of the changes reflected in the 1984 enactments were the result of his federal suit.

To recover under the "catalyst theory," Shipman had to first prove that a causal link existed between his lawsuit and the 1984 enactments. *Id.* at 763. Whether such a causal link existed is a question of fact. *United Handicapped Federation vs. Andre*, 622 F. 2d 342, 346 (8th Cir. 1980). The district court found that Shipman did not show a causal link between his federal suit and the 1984 enactments. Having carefully reviewed the record and the district court's memorandum opinion of May 20, 1988, we cannot conclude that the district court's finding of fact is clearly erroneous. Therefore, the district court's decision denying attorney's fees must be sustained.

Accordingly, the judgements of the district court are affirmed.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

Linden W. Shipman, *et al.*,	)	
	)	
Plaintiff,	)	
vs.	)	No. S 83-199 C
	)	
Missouri Division of Family Services, *et al.*,	)	
	)	
	)	
Defendants.	)	

MEMORANDUM

This cause is before the Court on the motion of plaintiff Linden W. Shipman for an award of attorney's fees and costs. The parties have consented to the exercise of jurisdiction over this action by a United States Magistrate. 28 U.S.C. §636(c).

On August 2, 1983, plaintiff Linden W. Shipman commenced this civil rights action against defendants Missouri Division of Family Services (DFS); and Joseph J. O'Hara and William Siedhoff, former DFS Directors. Plaintiff's amended complaint in one count alleges violations under 42 U.S.C. §1983. Plaintiff asserted that the defendants had violated (1) the Equal Protection and Due Process Clauses of the Fourteenth Amendment; (2) the Supremacy Clause of the Constitution of the United States; (3) federal regulations contained at 45 C.F.R. §§302.0-302.53; and (4) Article III, §1 of the Constitution of the State of Missouri. These violations, plaintiff argued, arose out of the State of Missouri's original and revised statutory schemes for recouping public

assistance benefits provided to children. §454.465 *et seq*, R.S.Mo. Plaintiff sought injunctive and declaratory relief, monetary damages, and attorney's fees.

On September 11, 1987, plaintiff filed a motion for summary judgement on the issue of liability. On November 27, 1987, plaintiff renewed the motion after being granted leave to file his amended complaint. Plaintiff argued that his claims were not mooted by the 1984 amendments to §454.465 *et seq*., that defendants failed to comply with the requirements of the applicable federal regulations; and that he was entitled to an award of attorney's fees under a "catalyst theory" of recovery.

On November 4, 1987, defendants filed their first motion for summary judgement as to all causes of action in plaintiff's original complaint. On November 27, 1987, defendants filed a second motion for summary judgement as to all causes of action in plaintiff's amended complaint.

On January 25, 1988, this Court ordered that defendants' motion for summary judgement be granted and plaintiff's motion for summary judgement be denied, except as to the issue of attorney's fees. On March 28 and 29, 1988, an evidentiary hearing was held on plaintiff's entitlement to a reasonable attorney's fee, based upon the catalyst theory concerning the 1984 amendments to the relevant statutes. At the hearing counsel for plaintiff presented evidence of the amount of time expended and the reasonable rate therefore as a prevailing party. Both parties presented evidence as to whether a causal link existed between the lawsuit and the state's amendment of the statute or Director Michael Henry's decision not to pursue any "state debt" owed by plaintiff. The undersigned makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Plaintiff Linden W. Shipman is the divorced non-custodial parent of two children who received Aid to Families with Dependent Children (AFDC) benefits from the State of Missouri. Plaintiff's ex-wife, the custodial parent of their two children, received public assistance benefits from March 1978 to March 1982. She also received public assistance benefits for her children for four months in 1983 and two months during 1984. (*Vol B. at 4.*)[1]

2. Defendant Missouri Division of Family Services (DFS) is the state agency charged with administering the AFDC program in Missouri. From 1982 to 1986, DFS was also the responsible state agency for the assessment and collection of "state debt" owed by non-custodial parents to the state for public assistance provided to their non-custodial children. Defendant Joseph J. O'Hara was the Director of DFS when plaintiff was served with notice of state debt owed. Defendant William Siedhoff was a successor in office as Director of DFS.

3. The Missouri Division of Child Support Enforcement (DCSE) is presently the state agency authorized to enforce child support obligations. Michael Henry was the Director of DCSE from January 6, 1986 through at least the date of the evidentiary hearing.

4. §454.465, R.S.Mo. (1982), set forth a non-custodial parent's obligation to reimburse the state for public assistance benefits provided to his or her children. When no court order established the non-custodial parent's support obligation, §454.465 empowered the Director of DFS to determine the amount of the obligation,

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[1]All references to the Transcript of the hearing before the Court on March 28 and 29, 1988, will be designated by volume and page number.

known as "state debt."[2]

5. In 1983 plaintiff was found by defendants to be financially responsible for a "state debt," pursuant to the 1982 statute. Defendants set the amount of state debt owed by plaintiff at the amount of public assistance paid to his ex-wife for their children's benefit: $11,722.00. The notice was sent on March 15, 1983. (*Vol. B at 5.*) Plaintiff objected to the finding and commenced the instant action in this court. Plaintiff also commenced an action in the Circuit Court of Dunklin County, Missouri, challenging the 1982 enactment and the 1983 finding of state debt. (*Def. Exh. H.*)

6. During the 1984 legislative session, the General Assembly amended six chapters concerning child support enforcement, including Chapter 454. (*See Missouri House Bill 1275, Def. Exh. G.*) Some of the amendments to Chapter 454 concerned sections challenged in plaintiff's complaint.

7. The instant action was dismissed by the district court on June 29, 1984, after a determination that abstention was appropriate under *Younger vs. Harris*, 401 U.S. 37 (1971) and *Middlesex County Ethics Committee vs. Garden State Bar Association*, 457 U.S. 423 (1982). *Shipman vs. Missouri Division of Family Services*, 588 F. Supp. 1203, 1207 (*E.D. Mo. 1983*), *vacated*, 782 F.2d 1048 (8th Cir. 1985). Plaintiff appealed the dismissal.

8. On May 24, 1985, the state circuit court dismissed the proceeding in that court and remanded plaintiff's case to DFS to be processed under the 1984 amended statutes. DFS then sought a writ of prohibition in the Missouri Court of Appeals. (*Def. Exh. H.*)

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[2] For brevity, the Court will refer to the original enactment of §454.465 *et seq.* as the 1982 enactments or statutes and the statutes as amended in 1984 as the 1984 amendments. The Court also notes that §454.465 R.S.Mo. was amended again in 1986.

9. On November 8, 1985, the judgement of the district court was vacated and the cause remanded with the following mandate:

> Under the present ruling of the state court, Shipman's challenge to the old statute and administrative procedure is mooted. We therefore remand this case to the district court with directions to retain jurisdiction until such time as the Missouri Court of Appeals passes on the writ of prohibition. If the writ is denied and Shipman's case is remanded to the Division of Family Services to be processed under the amended statute, the federal district court should dismiss the case as moot. If, however, the writ of prohibition is sustained and Shipman is required to process his administrative review in the Missouri state court under the old statute, the district court is requested to review Shipman's claim as to whether the administrative review in the state court under the old statute is insufficient to justify abstention under *Middlesex*. Under such circumstance, the district court is to either enter a new judgement on the grounds of abstention or to try plaintiff's claim under section 1983.

Shipman vs. Missouri Department of Family Services. slip op. *at* 3-4 (*8th Cir. November 8, 1985*).

10. On January 3, 1986, the Missouri Court of Appeals, Eastern District, denied defendants' request for a writ of prohibition. (*Def. Exh. H.*)

11. Defendants have undertaken no further action to process plaintiff's case under the amended statutes since the Missouri Court of Appeals' action. Neither have defendants made any further attempts to collect the state debt defendants previously determined to be owed by plaintiff.

12. Mr. Henry was employed by the Department of Social services' Division of General Counsel from January 1979 to August 1983. During his employment in the Office of General Counsel, Mr. Henry was assigned to DFS and worked with DFS on issues relating to the Child Support Enforcement Unit of the agency. (*Vol. A at 46-47; B at 5-7.*)

13. His duties included providing support to state prosecuting attorneys, who until 1982 performed the majority of the legal work for the DFS child support enforcement unit. He also provided legal advice to program administrators on policies and procedures, drafted legislation, and performed training (*Vol. B. at 8.*)

14. In August 1983 Mr. Henry left his state employment to work for a consulting firm in Washington, D.C. He was employed by University Research Corporation from August 1983 until the end of 1985. During this time he was employed on a contract basis with the federal Office of Child Support Enforcement. (*Vol. A at 47; B at 5-6.*)

15. Mr. Henry participated in preparing legislation which became §§454.465, *et seq.*, R.S.Mo. (1982). This statute was modeled after the State of Oregon's system for establishing current support obligations and judgements for reimbursement for public assistance provided. Mr. Henry drafted the legislation which later became §454.465 through §454.515, also known as the state debt procedure. (*Vol. A at 47-48.*) In 1982 and 1983, he assisted DFS in developing forms, procedures, and policies to implement this statute. (*Id., at 49.*)

16. The 1982 statute provided that when the state provided public assistance to a child, a parent absent from the home of that

child would accrue, as a state debt, the amount of public assistance provided to the child. If there was a court order setting child support arrearages, then the amount of the state debt was the amount set forth in the order. If there was no court order existing then, the Director of DFS could set or reset the amount. The amount could be lowered by the Director. Theoretically, it could be raised as well, but this was not DFS' practice. (*Vol. B. at 13.*)

17. When the original version of §§454.465 *et seq.* was drafted in 1982, DFS program administrators preferred an administrative process. However, after discussions with legislators, DFS decided to seek passage of a statute that left control of the process with the state courts. (*Vol. A at 53-54.*)

18. The implementation of the 1982 statute encountered docket delays of six to eight months in the state's urban jurisdictions when a hearing was requested by a parent. Sixty percent of the Division's cases were, and are, in those urban areas. DFS officials were aware in 1983 that the federal government was in the process of establishing time frames which would not be met in the urban jurisdictions because of the above problems. The federal guidelines were promulgated in 1984. (*Id., at 54.*)

19. DFS officials were also concerned that state judges would not be consistent throughout the state in setting amounts of current support. (*Id., at 54-55.*) DFS sought an administrative process that gave the agency control over the dockets and amounts of current support that would result from the hearings. (*Id.*)

20. Mr. Henry was aware in 1983 that a bill was pending in the United States Congress which required states to establish expedited procedures to handle the establishment of child support obligations. The legislation became federal law in 1984. Missouri was required to comply in order to continue to receive federal funding. (*Id., at 50.*) The Missouri General Assembly enacted

amendments in 1984 and 1986 to comply with the federal law. (*Id., at 50-51*)

21. Mr. Henry first became aware of plaintiff's state lawsuit in 1983 on the day on which the petition was served. The lawsuit "caught [his] attention because it was the only challenge that [DFS] had received to the administrative process statute since its enactment." Mr. Henry did not remember reading the pleading but was certain that he had done so. (*Vol. B at 7.*) He recalled that it alleged a due process challenge. (*Id.*)

22. In 1983 Mr. Henry discussed the plaintiff's case with Victoria Schwartz, a staff attorney in the Office of General Counsel of DSS. Ms. Schwartz aided in drafting legislation in 1983 that dealt only with changes to §454.440, R.S.Mo., which pertained to the state parent locator service. This legislation was submitted to sponsoring state representatives and later became House Bill 1275 (*HB 1275*). (*Vol. B at 8-11.*)

23. Ms. Schwartz left the State of Missouri's employ in May or June of 1987. (*Vol B at 11.*)

24. During 1984 Mr. Henry did not have responsibility for making policy decisions regarding legislation. The DFS Director, Mr. O'Hara, had that responsibility. (*Id., at 28.*)

25. In 1983 no conversations were held by Mr. Henry or Ms. Schwartz with Mr. O'Hara regarding plaintiff's lawsuit. (*Id., at 26.*)

26. In the fall of 1983, Mr. Henry returned to Missouri to aid in drafting legislation for the 1984 to testify on behalf of a paternity bill that he had drafted during the fall of 1983. (*Vol. B at 38; Vol. A at 57-58*).

27. As a general practice DFS develops legislative proposals for the forthcoming legislative year as soon as the current legislative session ends. The Division establishes a set of legislative priorities which are then submitted to the Department of Social Services (DSS). The Director of DSS then presents a

set of departmental priorities to the Governor (*Vol. A at 52.*)

28. On September 14, 1983, Mr. Paul Nelson, Supervisor for the child Support Enforcement Unit, sent a memo to Director O'Hara outlining the unit's legislative priorities for the 1984 legislative session. The document does not refer to the definition of state debt. (*Vol. B. at 28-30; Def. Exh. B.*)

29. When he developed the 1984 legislation concerning the administrative procedures and the sate debt collection, Mr. Henry did not discuss plaintiff's suit with DFS. Plaintiff's lawsuit was never brought up by Mr. Henry as a reason for seeking a change in the law. Nor did he hear anyone else discuss the suit. (*Vol. A at 55-56.*)

30. In the fall of 1983, Mr. Henry neither made nor heard any references to plaintiff's lawsuit during his work on 1984 legislative session priorities with Mr. Barrett Toan, then director of DSS. (*Vol. A at 57.*) Director Toan's outline of departmental legislative priorities for the 1984 legislative session contains no reference to the definition of state debt or plaintiff's lawsuit. (*Def. Exh. C; Vol. A at 56.*)

31. Mr. Henry assisted DSS in preparing the draft legislation that later became House Bill 1275. His work on the original version was limited to review and comment. Ms. Schwartz had drafted the §454.440 changes, and Mr. Henry had some input in them but no drafting responsibilities. (*Vol. A at 58.*) At no time did Mr. Henry participate in or become aware of any discussions on the need to change House Bill 1275's state debt provisions because of probable violation of either the due process or equal protection clause of the Fourteenth Amendment or the Supremacy clause of the United States Constitution. (*Id., at 61-62.*)

32. During no conversation that Mr. Henry had with DFS officials during the 1984 legislative session did the issue arise of needing to redefine the state debt, as set out in §454.465. (*Vol. A at 60.*)

33. The original version of House Bill 1275 does not contain any reference to "state debt." (*Def. Exh. E.*) The perfected version of House Bill 1275 contains no reference to the state debt procedure set out in §454.465, *et seq.*, with the exception of changes made to a lien statute, §454.515. (*Def. Exh. F.*) That statute's procedure is not at issue in the instant action. (*Vol. A at 58-60.*)

34. Amendments to the state debt procedures were contained in the finally passed Senate Committee Substitute for House Bill 1275. (*Def. Exh.G.*) This became the 1984 amendments to the child support enforcement statutes. Mr. Henry did not know how these provisions came to be in the final version of House Bill 1275. (*Vol. A at 60-61.*)

35. Mr. Henry did not discuss the 1984 amendments with the Governor of Missouri or any member of his staff in 1983 or 1984. The written DSS review of House Bill 1275 for the Governor, prior to his approval, contains no reference to plaintiff's suit or any of the issues raised therein. (*Def. Exh. D.*) The only discussion Mr. Henry had with a legislator was with Representative Danner on the original version of House Bill 1275. Plaintiff's case was not discussed with Representative Danner. (*Vol. A at 66-67.*)

36. Draft amendments to House Bills may be prepared by any state representative or senator or their staff. Also, various interest groups present proposed amendments to state legislators and agencies. State agencies may also suggest legislation. (*Vol A at 68-69.*)

37. There is generally no recording of the purpose for which a bill is enacted in the Missouri legislature. House Bill 1275 has no purpose clause. (*Vol. A at 69.*)

38. House Bill 1275 was altered from its original form by both the Missouri Senate and House of Representatives. (*Vol. B at 11.*) Mr. Henry had no personal knowledge of any changes in House Bill 1275 that were sponsored by DFS. (*Id., at 11-12.*)

The legislation was passed by both legislative houses and signed by the Governor of Missouri in 1984. (*Id., at 13.*).

39. The 1984 amendment relating to state debt provided that when there was no court order, the Director of DFS could set or reset the amount, not to exceed the amount of public assistance that had been provided. The 1984 amendment specifically set a "ceiling" on the amount of state debt the Director could set. (*Id., at 14.*).

40. In December 1985, the Division of Child Support enforcement (DCSE) was created within the Missouri Department of Social Services. Mr. Henry was appointed Director of DCSE on January 6, 1986, and has continued in that position to he current date. (*Vol. B at 6.*)

41. After Mr. Henry returned to Missouri in 1986, he discussed the 1984 amendments. No reference was made to plaintiff's suit in any discussion he had with his staff, DSS staff, or the Governor's staff. (*Vol. A at 69-72.*)

42. The 1986 legislation was designed to bring Chapter 454 into strict compliance with federal statutes and regulations. No discussion regarding the redefinition of state debt or changes in the administrative hearing process occurred during the development of the 1986 amendments. One change was made in the DCSE procedure regarding the issuance of administrative income withholding orders based on judicial current support obligations. This is not an issue in the instant action. (*Vol. A at 79-81.*)

43. Mr. Henry, as Director of DCSE, had the authority to settle, on behalf of the Division, only unliquidated claims that had not been reduced to judgement. He did not have the authority to settle a liquidated judgement owed to the State of Missouri. (*Vol. B at 21; Pl. Exh. 5.*)

44. Mr. Henry became familiar once more with plaintiff's case in the summer of 1987. He was surprised to learn that it was still

pending. (*Vol. B at 8.*)

45. Plaintiff's state agency administrative case was closed at the local level on May 31, 1984. No further action was taken by any DFS or DCSE employee after that date except regarding a change of address notice. (*Vol. A at 83-85*)

46. When plaintiff's case was closed in May of 1984, plaintiff should have received a computer-generated notice informing him that DFS was no longer pursuing support. No record of such notice exists. Neither plaintiff nor his counsel were notified of the case closing. (*Vol. B at 48-49.*) The case was not given a final determination by the Director, either directly or through delegation of authority to the local level, until Mr. Henry's action in November 1987. (*Id., at 54.*)

47. Plaintiff's case was the only case, to Mr. Henry's knowledge, remanded to DCSE by a state court. DCSE was unsure how to proceed with it and thus had taken no action regarding it. (*Vol. A at 91-92.*)

48. Mr. Henry decided, after a hearing in the present cause was held on November 9, 1987, to not pursue plaintiff for the amounts of public assistance that had been provided to his family from 1978 through 1982. (*Vol. B at 22-23.*) He stated that he did so, in part, to help resolve the instant dispute, but that reason "was not the overriding reason behind [his] decision." (*Id.*)

49. Mr. Henry had several reasons for deciding not to pursue any action against plaintiff for state debt owed. First, Mr. Henry believed that the Missouri statute of limitations prohibited any recovery on claims over five years old. Second, he calculated the remaining amount due the state from plaintiff to be approximately $600.00, and determined it was too minor to pursue. Third, plaintiff did not appear to possess sufficient assets to pay a judgement against him. Fourth, DCSE conserved staff resources and thus did not pursue small amounts of state debt. (*Vol. A at 86-89.*)

50. Plaintiff's lawsuit was not an important or significant factor in Mr. Henry's decision of November 1987 to not pursue any recoverable state debt form plaintiff. (*Vol. A at 92.*)

CONCLUSIONS OF LAW

Plaintiff contends that he is entitled to an award of attorney's fees as a prevailing party under a "catalyst theory" of recovery, pursuant to 42 U.S.C. §1988. Plaintiff argues that the 1984 amendments to §454.465 *et seq.* were proposed by defendants ten months after plaintiff commenced his suit. While not all the claims made by plaintiff are reflected in the 1984 amendments, plaintiff contends that sufficient changes were made as a result of his suit for him to be deemed a "prevailing party" entitled to an award of attorney's fees.

Defendants contend that plaintiff has not proven that the 1984 amendments were made as a result of his suit or that Director Henry's decision to not pursue any state debt due form plaintiff was caused by his suit. Defendants submit that the 1984 amendments were not made in response to plaintiff's suit, but rather as a part of an overall review of Missouri's child support enforcement program. Defendants argue that Director Henry determined that any state debt due from the plaintiff should not be pursued because the case had been closed for over three years. the amount that was collectible was small, plaintiff's assets were minimal, and DCSE needed to efficiently allocate agency resources.

"In order to be eligible for attorney's fees under §1988, a litigant must be a 'prevailing party.'" *Hewitt vs. Helms*, ___ U.S. ___, 107 S.Ct. 2672, 2675 (1987). In this action plaintiff must prove (1) a causal link between this lawsuit and the state's amendment of the statutes or the decision of Director Henry not to reopen plaintiff's case, and (2) plaintiff must have been the recipient of some benefit from the amendment. *Id., at 2675-77.*

The Court, in its Order of January 25, 1988, found that plaintiff may qualify as a prevailing party because defendants had conceded that the "state debt" allegedly owed by plaintiff for AFDC benefits provided to his children from March 1978 to March 1982 would not be sought by defendants. Further, should defendants seek a state debt for the one year of provided AFDC benefits not explicitly conceded by them, they will have to proceed under existing law, not the 1982 statute. Thus, plaintiff appears to meet the second factor set forth in *Hewitt*.

Plaintiff has not, however, satisfied the first part of the *Hewitt* test. Plaintiff has not shown that a causal link between his lawsuit and the state's amendment of the statutes or the decision of Director Henry not to reopen his case.

The Eighth Circuit has adopted the guidelines established in *Nadeau vs. Helgemoe*, 581 F.2d 275, 281 (1st Cir. 1978), for determining whether a plaintiff can be deemed to have prevailed on a catalyst theory. *United Handicapped Federation vs. Andre*, 622 F.2d 342, 345-46 (8th Cir. 1980). The first part of the test is a question of fact. (*Id., at 346*) The plaintiff must demonstrate that his lawsuit is causally linked to the relief obtained:

> [N]o award is required if the court determines that plaintiff's suit was completely superfluous in achieving the improvements undertaken by defendants on plaintiff's behalf . . .. However, if . . . the plaintiff's suit and their attorney's efforts were *a necessary and important factor in achieving the improvements* . . . plaintiffs should be held to have overcome their first hurdle toward their goal of receiving some attorney fees.

(*Id.*) This standard is referred to as the causation standard. While chronological evidence is a consideration in proving

causation, it is not conclusive. *Nadeau, supra,* 581 F.2d at 281.

The second part of the *Nadeau* test is a legal question. Plaintiff must demonstrate that defendants' conduct in response to the lawsuit was legally required:

> If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.

United Handicapped Federation, supra, 622 F.2d at 346. This part of the *Nadeau* test is sometimes termed the "non frivolity" standard.

The Court finds that plaintiff has been unable to develop any factual basis to support his claim that the 1984 amendments to §§454.465-454.510 were caused or given any impetus by his filing the instant action. Indeed, defendants have shown that the 1984 amendments were motivated by the need to come into compliance with federal regulations, not because of plaintiff's lawsuit. The finally passed Senate Committee Substitute for House Bill 1275 demonstrates that a sweeping change in the area of child support enforcement was made by the General Assembly. (*Def. Exh. G.*) The final version of House Bill 1275 amended five chapters other than Chapter 454 and included other sections in Chapter 454 which were not challenged in the instant action. There is no evidence that plaintiff's lawsuit was known to the members of the General Assembly, much less that it was a significant or substantial factor in the decision of the General Assembly to enact House Bill 1275.

Defendants have demonstrated that the original version of House Bill 1275 did not contain any reference to the state debt procedure. (*Def. Exh. E.*) Likewise, the perfected House Bill

1275 contained no reference to the challenged §§454.465-454.510. (*Def. Exh. F.*) As defendants argue, this is significant because there is no evidence that either the Department of Social Services or the Division of Family Services had any input on House Bill 1275 once it left the House chamber.

The 1984 legislative priorities for the child support enforcement program contains no reference to the plaintiff's federal lawsuit or any of the issues raised therein. (*Def. Exh. B.*) Likewise, the 1984 legislative objectives of the Department of Social Services and the Department's review of House Bill 1275 for the Governor's office contain no reference to the suit or any of the issues raised therein. (*Def. Exh. C and D.*)

The only testimony presented in this action was provided by Michael Henry, the Director of the Division of Child Support Enforcement. The state agency reasons for the 1984 amendments were: (1) to anticipate future changes required by federal law; (2) to reduce the significant delay in processing the caseloads in the urban areas of the state; and (3) to assure that a uniform determination of child support obligation would exist. There was neither a discussion of plaintiff's federal suit or the issues contained therein in relation to the 1984 legislative objectives of DFS or DSS nor a discussion of the need to redefine the state debt provision. Mr. Henry was unable to testify as to even one discussion with legislators or agency administrators where plaintiff's lawsuit was mentioned during the 1984 legislative session. The only evidence of a discussion relating to plaintiff's lawsuit was Mr. Henry's discussion in 1983 with Ms. Schwartz. No evidence was presented to the Court that demonstrates that this one conversation had any impact upon the 1984 amendments. Indeed, Ms. Schwartz's draft of House Bill 1275 contains no reference to the state debt procedure whatsoever. (*Def. Exh. E.*)

The Court also finds that Director Henry's stated reasons for deciding not to reopen the state debt case against plaintiff to be

persuasive and convincing. The Court finds that plaintiff's case was closed administratively at the local level in May 1984, and no significant action was taken by the state against plaintiff since that date. Mr. Henry closed the case at the Director's level because (1) the general five-year statute of limitations, Chapter 516, R.S.Mo., would have limited any new action to a recovery of only $600.00; (2) the plaintiff's assets were minimal; and (3) the Division did not normally pursue small debts, in order to effectively allocate agency time and resources. Mr. Henry also acknowledged that his agency was unsure as to how to proceed on plaintiff's case should it choose to do so because it was the only one remanded to the Division. Plaintiff's pending lawsuit was not an important or significant factor in his decision.

Because the Court has found that plaintiff has failed to meet the first part of the *Nadeau* test, there is no need to consider whether plaintiff has met the second part, the non-frivolity standard. Plaintiff has failed to demonstrate a causal connection between his lawsuit and the state's amendment of the statutes or the decision of the Director of DCSE to not reopen the state debt case against him. He, therefore, cannot be a prevailing party under a catalyst theory of recovery. *Hewitt vs. Helms, supra,* 107, S.Ct at 2675; *Zephier vs. Pierce*, 714 F.2d 856, 859 (8th Cir. 1983).

In light of the above findings of the Court, no discussion of the reasonableness of plaintiff's costs or his counsel's fees is required. Further, the defendants' motions to dismiss, for sanctions, and to strike are denied as moot. Plaintiff's motion for Rule 11 sanctions is also denied.

An appropriate Order will issue herewith.

DAVID D. NOCE
UNITED STATES MAGISTRATE

Signed this 20th day of May, 1988.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

Linden W. Shipman, *et al.*, Plaintiffs,	)	
vs.	)	No. S 83-199 C
Missouri Division of Family Services, *et al.*, Defendants.	)	

ORDER

In accordance with the memorandum issued herewith,

IT IS HEREBY ORDERED that plaintiff's motion for attorney's fees and costs be and it is denied.

IT IS FURTHER ORDERED that defendants' motion to dismiss, for sanctions, and to strike be and they are denied.

IT IS FURTHER ORDERED that plaintiff's motion for Rule 11 sanctions be and it is denied.

DAVID D. NOCE
United States Magistrate
Signed this the 20th day of May 1988.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

Linden W. Shipman, *et al.*,	)	
	)	
Plaintiff,	)	
vs.	)	No. S 83-199 C
	)	
Missouri Division of Family Services, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM

This cause is before the Court on the cross-motions of the parties for summary judgement pursuant to Fed.R.Civ.Pro. 56. The parties have consented to the exercise of jurisdiction over this action by a United States Magistrate. 28 U.S.C. §636(c).

On August 2, 1983, plaintiff Linden W. Shipman commenced this civil rights action against defendants Missouri Division of Family Services (DFS); Joseph J. O'Hara, former DFS Director; and William Siedhoff, present DFS Director. Plaintiff's amended complaint in one count alleges violations under 42 U.S.C. §1983. Plaintiff asserts that the defendants have violated (1) the Equal Protection and Due Process Clauses of the Fourteenth Amendment; (2) the Supremacy Clause of the Constitution of the United States; (3) federal regulations contained at 45 C.F.R. §§302.0-302.53; and (4) Article III, Section 1 of the Constitution of the State of Missouri. These violations, plaintiff argues, arise out of the State of Missouri's original and revised statutory

schemes for recouping public assistance benefits to children. §§454.465 *et seq.*, R.S.Mo. Plaintiff seeks injunctive and declaratory relief, monetary damages, and attorney's fees.

Section 454.465, R.S.Mo. (1982), sets forth a non-custodial parent's obligation to reimburse the state for public assistance benefits provided to his or her children. When no court order established the non-custodial parent's support obligation, §454.465 empowered the Director of DFS to determine the amount of the obligation, known as "state debt."[1]

In 1983 plaintiff was found by defendants to be financially responsible for a "state debt," pursuant to the 1982 enactment.

During the 1984 legislative session, the General Assembly amended six chapters concerning child support enforcement, including Chapter 454. (*See, Mo. House Bill 1275, Defs. Exh. A, attached to defendants' suggestions in opposition to plaintiff's motion for summary judgement, filed September 30, 1987.)* Some of the amendments to Chapter 454 concerned sections challenged in plaintiff's complaint.

The instant action was dismissed by the district court on June 29, 1984, after a determination that abstention was appropriate under *Younger vs. Harris,* 401 U.S. 37 (1971) and *Middlesex County Ethics Committee vs. Garden State Bar Association*, 457 U.S. 423 (1982). *Shipman vs. Missouri Division of Family Services*, 588 F.Supp. 1203, 1207 (E.D. Mo. 1983), *vacated,* 782 F.2d 1048 (8th Cir. 1985). Plaintiff appealed the dismissal.

On May 24, 1985, the state circuit court dismissed the proceeding in that court and remanded plaintiff's case to DFS to be processed under the 1984 amended statutes. DFS then sought

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[1]For brevity, the Court will refer to the original enactment of §§454.465 *et seq.* as the 1982 enactments or statutes and the statutes as amended in 1984 as the 1984 amendments. The Court also notes that §454.465 R.S.Mo. was amended again in 1986.

a writ of prohibition in the Missouri Court of Appeals.

On November 8, 1985, the judgement of the district court was vacated and the cause remanded with the following mandate:

> Under the present ruling of the state court, Shipman's challenge to the old statute and administrative procedure is mooted. We therefore remand this case to the district court with directions to retain jurisdiction until such time as the Missouri Court of Appeals passes on the writ of prohibition. If the writ is denied and Shipman's case is remanded to the Division of Family Services to be processed under the amended statute, the federal district court should dismiss the case as moot. If, however, the writ of prohibition is sustained and Shipman is required to process his administrative review in the Missouri state court under the old statute, the district court is requested to review Shipman's claim as to whether the administrative review in the state court under the old statute is insufficient to justify abstention under *Middlesex*. Under such circumstances, the district court is to either enter a new judgement on the grounds of abstention or to try plaintiff's claim under §1983.

Shipman vs. Missouri Department of Family Services, slip op. *at* 3-4 (8th Cir. November 8, 1985). On January 3, 1986, the Missouri Court of Appeals, Eastern District, denied defendants' request for a writ of prohibition. (Defendants' suggestions in opposition to plaintiff's motion for leave to amend complaint, filed September

16, 1987, *at* 1.)

In June 1987, both parties announced their readiness for trial and consented to submitting the case to a United States Magistrate. On June 29, 1987, the parties were given until August 1, 1987, to file any motions to dismiss or to amend the pleadings. Plaintiff moved to amend his complaint on July 30, 1987, pursuant to Fed.R.Civ.Pro. 15, in order to "simplify the issues, assert additional bases for relief, and set forth event which have taken place subsequent to the filing of the original complaint." This Court granted plaintiff's motion to amend and supplement his complaint on November 5, 1987. The defendants have filed an answer, and both parties have motions for summary judgement now before the Court.

On September 11, 1987, plaintiff filed a motion for summary judgement on the issue of liability. On November 27, 1987, plaintiff renewed the motion. Plaintiff argues that: (1) his claims are not mooted by the 1984 amendments to §§454.465 *et seq.*; (2) defendants have failed to comply with the requirements of the applicable federal regulations; and (3) he is entitled to an award of attorney's fees under a "catalyst theory" of recovery.

On November 4, 1987, defendants filed their first motion for summary judgement as to all causes of action in plaintiff's original complaint. On November 27, 1987, defendants filed a second motion for summary judgement as to all causes of action in plaintiff's amended and supplemented complaint.

This Court must grant summary judgement if, based upon the pleadings, admissions, depositions and affidavits, there exists no genuine issue of material fact and the moving party is entitled to judgement as a matter of law. Fed.R.Civ.Pro. 56(c); *Celotex Corporation vs. Catrett*, ___ U.S. ___, 106 S.Ct. 2548, 2552 (1986); *Board of Education, Island Trees, etc. vs. Pico*, 457 U.S. 853, 863 (1982). The moving party must initially demonstrate the absence of an issue for trial. *Celotex Corporation, supra*, 106 S.Ct. *at* 2553.

Any doubt as to the existence of a material fact must be resolved in favor of the party opposing the motion. *Board of Education, Island Trees, supra,* 457 U.S. *at* 863. Nevertheless, once a motion is properly made and supported, the non-moving party may not rest upon the allegations in his pleadings but must instead set forth specific facts showing that there is a genuine issue of material fact for trial. Fed.R.Civ.Pro. 56(e); *Buford vs. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984). Summary judgement must be granted to the movant if, after adequate time for discovery, the non-moving party fails to produce any proof to establish an element essential to the party's case and upon which the party will bear the burden of proof at trial. *Celotex Corporation, supra,* 106 S.Ct. *at* 2552-53.

Plaintiff argues that the Eighth Circuit decision determining his claims under the 1982 statute to be moot is in error. Plaintiff urges this Court to grant summary judgement in his favor on the issues relating to the legality of the 1982 enactments and defendants' subsequent actions relating thereto.

Defendants respond that plaintiff's claims with respect to the 1982 statute are moot with the exception of a possible motion for costs. Defendants argue that the issue of whether plaintiff's claims were rendered moot was raised by plaintiff in his brief to the Eighth Circuit. (*See Defs. Exh. A and B attached to defendants' first and second sets of suggestions in opposition to plaintiff's motion to amend complaint.*) Defendants courts' determinations that plaintiff's claims should be processed under the 1984 amendments rendered moot plaintiff's claims under the 1982 statute.

As a matter of law, this Court cannot state that the Court of Appeals mandate is in error.

> When a case has been decided by [an appellate court] and remanded to the District Court, every question which was before [the appellate] court and disposed

> of by its decree is finally settled and determined. The District Court is bound by the decree and must carry it into execution according to the mandate. It cannot alter it, examine it except for purposes of execution, or give further or other relief or review it for apparent error with respect to any question decided on appeal . . ..

Houghton vs. McDonnell Douglas Corporation, 627 F.2d 858, 864-65 (8th Cir. 1980), *quoting Thornton vs. Carter*, 109 F.2d 316, 319-20 (8th Cir. 1940).

Therefore, plaintiff's first contention is plainly in error. As a matter of law, plaintiff's claims under the 1982 statute were rendered moot when the Missouri Court of Appeals denied defendants' writ of prohibition, thus upholding the state circuit court's remand of plaintiff's case to DFS to be processed under the 1984 amended statute. *Shipman vs. Missouri Department of Family Services, supra*, No. 84-1961 *at* 3. Thus plaintiff is not entitled to a judgement as a matter of law in the instant action on the issue of the legality of the 1982 statute and defendants' subsequent actions relating thereto, except possibly an award of attorney's fees.[2]

Plaintiff next contends that he is entitled to summary judgement on whether the present state statutory scheme is in compliance with the applicable federal regulations. Specifically,

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[2]Any reliance by plaintiff *Standard Oil Company of California vs. United States*, 429 U.S. 17 (1976), is inapposite. *Standard Oil* held that a district court can take appropriate action on a Rule 60(b) motion without obtaining leave of the appellate court. The matter before the Court does not pertain to a Rule 60(b) issue as there is no final judgement in the present cause. *See, Fed.R.Civ.Pro. 60(b)*. Plaintiff has had the opportunity to move the Eighth Circuit to modify or vacate its mandate, but has evidently chosen not to do so.

plaintiff argues that §454.465(4) R.S.Mo. (1984 Supp.) authorizes DFS to "promulgate such rules as may be necessary to carry out the provisions of this chapter . . .." Plaintiff contends that defendants have not yet promulgated any regulations to determine the amount of money for which a noncustodial parent is liable when his (or her) child has received Aid to Families with Dependent Children (AFDC) benefits. Plaintiff argues that DFS is required as the identified IV-D Agency to promulgate such regulations under Title IV-D of the Social Security Act, 42 U.S.C. §§1302 *et seq.*, and the implementing federal regulations at 45 C.F.R. §§302.1 *et seq*. Further, plaintiff asserts, the amount owed by a noncustodial parent is to be determined by utilizing a formula which takes into consideration factors enumerated in 45 C.F.R. §302.53(a). *See,* 45 C.F.R. §§302.50, 302.53. Plaintiff contends that the federal regulations supersede state law, because of the Supremacy Clause of the United States Constitution.

Defendants argue that plaintiff lacks standing to raise any issue as to the validity of the "state debt" statute as amended in 1984 or 1986 because plaintiff has suffered no actual or threatened injury. *Heckler vs. Mathews*, 465 U.S. 728, 738 (1984). The issue of standing must first be addressed by the Court, because a finding in defendants' favor would render it unnecessary to consider the parties' other arguments except those as to attorney fees.

In order to possess standing in the present matter, plaintiff must have alleged such a personal stake in the outcome of the instant controversy as to warrant the invocation of federal court jurisdiction and to justify exercise of the court's remedial powers. *Baker vs. Carr*, 369 U.S. 186, 204 (1962). A federal court's jurisdiction may be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action. *Warth vs. Seldin*, 422 U.S. 490, 499 (1975). Plaintiff must allege a "distinct and palpable" injury,

Gladstone, Realtors vs. Village of Bellwood, 441 U.S. 91, 114 (1979) not an "abstract," "conjectural," or "hypothetical" one. *City of Los Angeles vs. Lyons*, 461 U.S. 95, 102 (1983). The injury alleged must be fairly traceable to the challenged action. *Allen vs. Wright*, 469 U.S. 737, 751 (1984. Finally, the relief sought must be likely to result from a favorable decision. *Id.*

Thus, the general requirements for standing are that (1) plaintiff has alleged an actual or threatened injury as a result of the defendants' conduct; (2) the alleged injury must be fairly traceable to the defendants' actions that are challenged; and (3) the injury alleged must be likely to be redressed by a favorable decision. *Valley Forge Christian College vs. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Arkla Exploration Company vs. Texas Oil & Gas Corp.*, 734 F.2d 347, 353 (8th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985).

The focus on whether standing exists is on the party seeking relief, not the issues the plaintiff desires to have tried. *Flast vs. Cohen*, 392 U.S. 83, 99 (1968). An asserted right to have the government act in accordance with the law is not, *per se*, sufficient to confer standing on a plaintiff. *Schesinger vs. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). While plaintiff does not have to await the consummation of threatened injury to obtain preventive relief, the injury must certainly be impending. *See, Babbitt vs. United Farm Workers National Union*, 442 U.S. 289, 305 (1979).

Plaintiff argues that he may be subject to an action by defendants to recover state debt for AFDC benefits provided to his children from March 1982 to March 1983. Alternatively, plaintiff contends he might be liable for public assistance benefits that might be liable for public assistance benefits that might be paid on behalf of his children in the future. (*See, plaintiff's response to defendants' motion for summary judgement, filed December 18, 1987, at p. 7.*)

In the present action, plaintiff alleges no actual or threatened injury as a result of the 1984 or 1986 amendments. His injuries, if any, were a result of the state debt assessed against him under the 1982 statute. That cause of action, as determined by the Eighth Circuit, is now moot because of the rulings of the Missouri courts. (*See, plaintiff's amended complaint at ¶¶44-45.*) Defendants have no present actions instituted against plaintiff for collection of the state debt assessed under the 1982 statute and have indicated that no proceedings will be instituted against plaintiff for collection of any of the disputed state debt due from March 1978 to March 1982. (*See, defendants' motion for summary judgement, filed November 27, 1987, Exhibit A, at ¶4.*) Any action by defendants for a state debt arising from AFDC benefits provided to plaintiff's children from March 1982 to March 1983 will have to be pursued by defendants under the amended statutes, not the 1982 enactment. (*See, plaintiff's amended complaint, at ¶44-45.*) Until such proceedings are initiated against plaintiff, they remain conjectural only. Plaintiff cannot now show that defendants will not further amend the child support enforcement statutes or promulgate additional administrative guidelines in order to comply with any applicable federal law or regulation that may now not be met by them.

Plaintiff is not entitled to the equitable relief sought because such relief cannot be granted for an unconstitutional act where there is no real and immediate threat of the repeated injury. *City of Los Angeles vs. Lyons, supra*, 461 U.S. *at* 110. Neither is plaintiff entitled to monetary relief because no injuries to plaintiff as a result of any action by defendants pursuant to the 1984 or 1986 amendments are alleged in his amended complaint. Hypothetical application of the amended state debt statute in the future is not sufficient to present a court with a present case or controversy. *Thomas vs. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 579-80 (1985); *see Lyons, supra,* 461 U.S. *at* 110.

Finally, plaintiff contends that he is entitled to an award of attorney's fees as a prevailing party under a "catalyst theory" of recovery, pursuant to 42 U.S.C. §1988.[3] Plaintiff argues that the 1984 amendments to §§454.465 *et seq.* were proposed by defendants ten months after plaintiff commenced his suit. While not all the claims made by plaintiff are reflected in the 1984 amendments, plaintiff contends that sufficient changes were made as a result of his suit for him to be deemed a "prevailing party" entitled to an award of attorney's fees.

Defendants contend that plaintiff fails to support his argument with sufficient facts to demonstrate that the 1984 amendments were made as a result of his suit. Defendants argue that plaintiff's statement of facts in his memorandum and amended complaint are an insufficient basis on which to grant summary judgement, because they are not based upon first-hand knowledge. *Chambers vs. United States* , 357 F.2d 224, 228 (8th Cir. 1966). Defendants also assert that plaintiff's motion should be submitted as one for costs, not summary judgement. Lastly, defendants submit that the 1984 amendments were not made in response to plaintiff's suit, but rather as a part of an overall review of Missouri's child support enforcement program. (*Def. suggestions in opposition to plaintiff's motion for summary judgement, filed September 30, 1987, Exhs. A to D; Affidavit of Chad Jordan.*)

"In order to be eligible for attorney's fees under §1988, a litigant must be a 'prevailing party.'" *Hewitt vs. Helms,* ___ *U.S.* ___, 107 S.Ct. 2672, 2675 (1987). There must be (1) a causal link between the lawsuit and the state's amendment of the statutes, and (2) plaintiff must have been the recipient of some benefit

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[3] In light of the above discussion, it is apparent that plaintiff cannot be entitled to attorney's fees for his claims against the amended statutes; therefore, only plaintiff's claims asserted against the 1982 statute are considered herein.

from the amendment. *Id., at* 2675-77.

Plaintiff may qualify as a prevailing party because defendants have conceded that the "state debt" allegedly owed by plaintiff for AFDC benefits provided to his children from March 1978 to March 1982 will not now be sought by defendants. Further, should defendants seek a state debt for the one year of provided AFDC benefits not explicitly conceded by them, they will have to proceed under existing law, not the 1982 statute. Thus, plaintiff meets the second factor set forth in *Hewitt.*

Plaintiff has not, however, on the present state of the record satisfied the first part of the *Hewitt* test. Plaintiff has not shown that there is an absence of dispute as to a material fact essential to his claim: that the 1984 amendments were made in response to his suit. Fed.R.Civ.Pro. 56(e); *Buford vs. Tremayne, supra,* 747 F.2d *at* 447.

Defendants' contention that a material issue of fact exists is correct. Defendants' memorandum, exhibits and affidavits are in direct opposition to plaintiff's assertions. Summary judgement is not intended as a substitute for the trial of disputed fact issues. *Wilson vs. Myers*, 823 F.2d 253, 256 (8th Cir. 1987). Therefore, plaintiff is not entitled to summary judgement as to an award of attorney's fees. This issue will be heard by the Court, and relevant evidence thereon received, during the current setting of the action during the week of February 22, 1988 in Cape Girardeau.

An appropriate Order will be entered.

DAVID D. NOCE
United States Magistrate

Dated this 25th day of January, 1988.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

Linden W. Shipman, *et al.*, Plaintiffs,	)	
vs.	)	No. S 83-199 C
Missouri Division of Family Services, *et al.*,	)	
Defendants.	)	

ORDER

In accordance with the memorandum issued herewith,

IT IS HEREBY ORDERED that the motion of plaintiff for summary judgement be and it is denied except as to the issue of attorney's fees.

IT IS FURTHER ORDERED that the motion of defendants for summary judgement be and it is granted except as to the issue of attorney's fees.

IT IS FURTHER ORDERED that an evidentiary hearing on plaintiff's entitlement to a reasonable attorney's fee, based upon the catalyst theory concerning the 1984 amendments to the relevant statutes, be and it is set for February 22, 1988 at 9:00 a.m. in Cape Girardeau immediately following the trial of Cause No. S86-69 C, if that case is not otherwise determined. Plaintiff in this case shall offer evidence of the amount of time reasonably expended and the reasonable rate therefore as a prevailing party. Prior to said hearing plaintiff's counsel shall allow defendants an opportunity to review attorney time records (excluding information protected by the attorney-client privilege) and other relevant documents underlying the claim for attorney's fees.

DAVID D. NOCE, U.S. Magistrate
Signed this the 25th day of January 1988.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1961

Linden W. Shipman, Individually and on behalf of others similarly situated,

Appellant,

vs.

Missouri Department of Family Services and Joseph O'Hara, Individually and as Director of Division of Family Services,

Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 11, 1985
Filed: November 8, 1985

Before LAY, Chief Judge, McMillian, Circuit Judge, and WOODS,* District Judge

PER CURIAM.

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*The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

This civil rights action brought under 42 U.S.C. §1983 arises out of appellant's challenge to the State of Missouri's statutory scheme setting forth a non-custodial parent's obligation to reimburse the state for public assistance benefits received by his or her children. The district court dismissed the action on the ground of abstention. In view of ongoing proceedings in the state court, we vacate the judgement of the district court and remand with further directions.

Under the former state statute, if there is no court order establishing the non-custodial parent's support obligation, the Director of the Department of Family Services is empowered to set the obligation, known as "state debt," at a level not to exceed benefits actually paid. Domestic Relations Act, 1982 Mo. Laws 633, §14 (repealed 1984). The "notice and finding of financial responsibility" is served on the debtor-parent in the manner prescribed for service of process in a civil action. Domestic Relations Act, 1982 Mo. Laws 633-634, §15 (repealed 1984). The debtor-parent may request a "negotiation conference" or send written objections requesting a hearing. If no action is taken by the debtor-parent the Director may enter an order which immediately subjects the debtor-parent to collection, "including, but not limited to, wage withholding, garnishment, liens, and execution thereon." *Id.* If a hearing is requested, the Director certified the matter to a court by transferring copies of the notice and any orders entered as well as the debtor-parent's written objections and request for a hearing. Domestic Relations Act, 1982 Mo. Laws 635, §18 (repealed 1984). The court is then required to set the matter for hearing and notify all parties by regular mail. *Id.*

In 1983, Linden Shipman, a resident of Missouri, received a notice and finding of financial responsibility from the Director. At the time, Shipman was divorced and under no court-imposed obligation to support his children. Shipman objected to the finding and the Director certified the matter to the Circuit

Court of Dunklin County. On August 2, 1983, Shipman filed the present case as a class action in the United States District Court for the Eastern District of Missouri under 42 U.S.C. §1983. Shipman seeks to represent a class of non-custodial parents whose children receive Aid to Families with Dependent Children (AFDC) or Medicaid benefits and whose support obligation has not been established by court decree. According to Shipman, the "state debt" system violates due process, the right to trial by jury, and various federal laws and regulations, as well as the Constitution of the State of Missouri. Plaintiff seeks injunctive and declaratory relief, damages, and attorneys' fees. Because the action before the Circuit Court of Dunklin County was still pending, the district court, the Honorable H. Kenneth Wangelin presiding, dismissed the case in June, 1984, on the ground of abstention. *See Middlesex County Ethics Committee vs. Garden State Bar Association,* 457 U.S. 423 (1982); *Younger vs. Harris,* 401 U.S. 37 (1971). Shipman has appealed.

Since Shipman appealed, the Missouri legislature has amended the challenged provisions providing a new procedural basis for handling such cases. *See* Mo. Rev. Stat. §§454.460-460-510 (Supp. 1984). We are informed by Shipman's attorney that the state trial court has ruled that Shipman's case should be remanded to the Division of Family Services with directions that Shipman's case be procedurally processed under the new statute. We are also informed that the State Director is seeking a writ of prohibition from the Missouri Court of Appeals against the state judge challenging his jurisdiction to remand the case under the new Act.

Under the present ruling of the state court, Shipman's challenge to the old statute and administrative procedure is mooted. We therefore remand this case to the district court with directions to retain jurisdiction until such time as the Missouri Court of Appeals passes on the writ of prohibition. If the writ is

denied and Shipman's case is remanded to the Division of Family Services to be processed under the amended statute, the federal district court should dismiss the case as moot. If, however, the writ of prohibition is sustained and Shipman is required to process his administrative review in the Missouri state court under the old statute, the district court is requested to review Shipman's claim as to whether the administrative review in the state court under the old statute is insufficient to justify abstention under *Middlesex*. Under such circumstances, the district court is to either enter a new judgement on the grounds of abstention or to try plaintiff's claim under §1983.

It is so ordered.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

45 CODE OF FEDERAL REGULATIONS CHAPTER III - CHILD SUPPORT ENFORCEMENT PROGRAM

PART 302 - STATE PLAN REQUIREMENTS

§302.50 SUPPORT OBLIGATIONS

The State plan shall provide as follows:

(a) The support rights assigned to the IV-D agency pursuant to §232.11 of this title or section 471(a)(17) of the Act constitute an obligation owed to the State by the individual responsible for providing such support. Such obligation shall be established by:

(1) Order of a court of competent jurisdiction,

(2) Other legal process as established by State laws, such as an administrative hearing process or a legally enforceable and binding agreement;

* * *

(b) The amount of the obligation described in paragraph (a) of this section shall be:

(1) The amount specified in the order of a court of competent jurisdiction which covers the assigned support rights; or

(2) If there is no court order, an amount determined in writing by the IV-D agency as part of the legal process referred to in paragraph (a)(2) of this section in accordance with a formula which meets the criteria prescribed in §302.53.

§302.53 FORMULA FOR DETERMINING THE AMOUNT OF THE OBLIGATION

The State plan shall provide as follows:

(a) There shall be a formula to be utilized by the IV-D agency in determining the amount of the support obligation pursuant to §302.50 when there is no court order covering the obligation. Such formula must take into consideration the following criteria:

(1) All earnings, income and resources of the absent parent including real and personal property;

(2) The earnings potential of the absent parent;

(3) The reasonable necessities of the absent parent;

(4) The ability of the absent parent to borrow;

(5 The need of the child for whom the support is sought;

(6) The amount of assistance which would be paid to the child under the full standard of need of the State's IV-A plan;

(7) The existence of other dependents; and

(8) Other reasonable criteria which the State may choose to incorporate.

(b) The formula described in paragraph (a) of this section must be designed to insure, as a minimum, that the child for whom support is sought benefits from the income and resources of the absent parent on an equitable basis in comparison with any other minor children of the absent parent.

(c) The formula described in paragraph (a) of this section shall be utilized to determine the required monthly support obligation, the amount of support obligation arrearage, if any, and the amount to be paid periodically against such arrearage.

TESTIMONY OF MICHAEL HENRY DURING HEARINGS ON ATTORNEYS FEES MARCH 28-29, 1988

Mr. Henry: We didn't change our policy when the law changed, so we would have held him accountable to the same amount of reimbursement [state debt].

[Tr., Vol. B. pages 39-40, lines 24-25/1-2].

Q. Does the State have any plans at the present time of promulgating any rules or regulations which would establish a formula for determining child support arrearages, using the factors set out in 302.53 of the federal regulations?

A. No. . .

Q. Let me ask you, when did you first consider waiving the state debt for Mr. Shipman?

A. November 1987.

Q. How did you become aware of the possibility of waiving that?

A. I discussed it with my counsel.

[Tr., p. 31, lines 14-19].

Q. Did you discuss the matter with Mr. Cornwell before he appeared there [November 9, 1987 hearing]?

A. Yes

Q. After discussing with Mr. Cornwell the proposed hearing, did you make any decision as to what action he would take in that hearing?

A. I made a decision regarding our future posture on the case.

Q. Okay, What was that decision?
A. I believed that it would help resolve the dispute, although that was not the overriding reason behind the decision.

Q. In fact, prior to that hearing, Mr. Cornwell, in the conference call, had advised Judge Noce that it was likely that the claim would be withdrawn by the State and not pursue that matter, and he further advised that he would be filing a motion to dismiss for lack of standing. Is that what you understood --
A. Yes.

Q. -- to be a way of resolving the case?
A. Yes.

Q. That if you did that, then the plaintiff would have no standing and the case would be dismissed.
A. I don't know if my thinking went quite that deep.

Q. But in general?
A. Yes.

[Tr., p. 21-23, lines 18-25/1-25/1-6].